NO. 432

October Term, 1950

SUPREME COURT OF THE UNITED STATES

WALTER G. HOUGLAND, INC., Owner of Motor Vessel Walter G. Hougland, and MOTOR VESSEL WALTER G. HOUGLAND, Her Engines, Tackle, Etc.,

Appellants

vs.

GEORGE J. MUSCOVALLEY, SR., Owner of Tugboat J W S,

Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

INTRODUCTION

Comes now The American Waterways Operators, Inc., a Corporation existing under and by virtue of the laws of the State of Delaware, with principal offices at 1 F Street, N.W., Washington, D. C., and moves that leave be granted to file a brief amicus curiae in support of appellants in the above entitled case.

The American Waterways Operators, Inc., is an Association of common, contract and private water carriers who

operate throughout the Ohio and Mississippi River Systems, the Gulf Intracoastal Waterway, the Gulf of Mexico, the Atlantic Intra-coastal Waterway and waterways on the Eastern Seaboard, New York Harbor, Long Island Sound, Hudson River and New York State Barge Canal, as well as California, Washington and Oregon. The Association is a non-profit corporation which has for its general purposes the consideration and solution of problems of management and policy affecting the operation and welfare of water carriers.

BASIS FOR MOTION

By virtue of Order issued by the Supreme Court of the United States, October Term, 1949, dated November 14, 1949, paragraph 9 of Rule 27, the Rules of the Court were amended, and among other provisions there was inserted Rule 9(c).

The petitioner respectfully states that counsel for parties in the above entitled matter have been requested to agree as provided in Rule 9(a) of the Court's Rules of Procedure to consent to the filing by petitioner of a brief amicus curiae. Counsel for appellee has stated to petitioner in writing that he cannot consent thereto. Counsel for appellant, however, has agreed to the filing of such a brief. Therefore, this Motion for Leave to File is presented as required by Rule 9(c).

INTEREST OF PETITIONER

As set forth hereinabove, petitioner is an Association of small vessel operators, including towboat and tugboat companies, navigating practically all inland waters, including the harbors and bays in the United States. At the di-

rection of the Board of Directors of petitioner at a meeting duly held in New Orleans, Louisiana, December 12, 1950, the Association was instructed, through counsel, to file a brief amicus curiae in this proceeding, in which one of the issues concerns the question of the effect of an "owner's risk" clause in a towing agreement. Because of the fact that the practice of towing at owner's risk is one of long standing in the Industry, and is the customary method of performing such transportation service, it is strongly felt by the Industry generally that a clear and precise finding by the Court of the extent, if any, to which an "owner's risk" clause in a towing contract is binding when negligence has been established, would be most beneficial.

In addition thereto, it should be stated that many operators, members of the Association, perform towing services within the Second Circuit, and many operators perform such services within the Sixth Circuit.

QUESTION OF LAW WHICH IS BELIEVED TO REQUIRE CLARIFICATION

One of the principal issues in the instant proceeding is the interpretation and the legal consequences of an "owner's risk" clause, and the validity thereof to relieve a towing vessel from liability on account of ordinary negligence or want of ordinary care.

Eminent counsel for appellant on brief filed in this proceeding in the United States Court of Appeals for the Sixth Circuit, which brief it is understood has been made a part of the record, discusses (beginning on page 29 thereof) the question in which your petitioner, on behalf of the Industry

generally, is interested. In that connection, on page 30 o
the abovementioned brief, a discussion is found concernin
The Syracuse, 12 Wallace 167; 20 L. ED. 382, decided
1870. On the pages following page 30 of the brief, throug
page 41 thereof, further discussion of this question is ha
and various cases cited in support thereof. Eminent cou
sel's interpretation of statements made by this Court, a
by various lower courts, is set forth, from which the conc
sion is drawn that a clause known as an "owner's risk
clause is valid and binding in the case of ordinary neg
ligence.

Beginning also on page 29 of appellee's brief, in th
United States Court of Appeals for the Sixth Circuit, the
is discussed by eminent counsel for appellee the identic
question. In support of the contrary position, this couns
cites the identical leading case, namely, *The Syracuse,* a
on pages 29 to 33 of this brief, counsel for appellee cit
numerous other cases identical to those cited by counsel f
appellant. In this brief counsel then concludes that a
"owner's risk" clause is not binding in the case of neg
gence by the tower.

With respect to the cases cited in the two briefs me
tioned above, it is evident that: (1) There is a substantial
divided line of cases on the question as between the Seco
and Sixth Circuits; and (2) There is no agreement amo
counsel for litigants, not only in the instant proceeding, b
in similar cases now pending, as to the exact interpretati
which has been placed on such a clause by the Supre
Court of the United States, if such an interpretation has
fact been made.

In view of the above therefore, it is earnestly suggest
that this confusion redounds to the detriment of the enti

Towing Industry, and that presentation by counsel on behalf of a single client will not necessarily furnish a proper presentation to the Court for a decision of this question of law on its merits, without other and extraneous matters necessarily being considered. It is respectfully suggested therefore, that a brief amicus curiae now, on behalf of this Association representing a substantial part of the Industry, would have a tendency to assist in clarifying the issue.

WHEREFORE, petitioner respectfully prays that an Order be entered in this proceeding, permitting the filing of a brief amicus curiae.

Respectfully submitted,

JOHN H. EISENHART, JR.
1319 F Street, N. W.
Washington, D. C.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by registered mail upon the following counsel for all parties of record:

MR. EDWARD B. HAYES
135 S. LaSalle Street
Chicago, Illinois

MR. JAMES G. WHEELER
c/o Wheeler & Marshall
Citizens Savings Bank Bldg.
Paducah, Kentucky

Dated at Washington, D. C., this 25th day of January, 1951.

JOHN H. EISENHART, JR.
Attorney

FILED
JAN 31 1951
CHARLES ELMORE CROPLEY

IN THE

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Appellee.

Appeal from the United States District Court for the Western District of Kentucky.

OBJECTION OF RESPONDENT TO MOTION OF "AMERICAN WATERWAYS OPERATORS, INC.," FOR LEAVE TO FILE BRIEF HEREIN AMICUS CURIAE.

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Respondent respectfully submits that the fact counsel disagree as pointed out in the motion, is no reason to suppose that the state of the law requires a brief *amicus curiae* on a Petition for Certiorari.

Even if it were true that there were "a substantially divided line of cases," it would not follow therefrom that a brief *amicus curiae* was required, after this Court had made "the state of the law" plain, as it did in 1928 by its decision in *Compania de Navegacion* v. *Fireman's Fund Insurance Co.*, 277 U.S. 66, 70, 73-74 (1928), rejecting the "divergent" cases, which were cited to it; and *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U.S. 291, 295 (1932); 55 F. (2d) 63 (CA 2, 1932)—decisions that eminent counsel for the Petitioners do not mention—and the challenged decisions of the concurrent courts below are in accord with this Court's reiterated views.

This would seem to be especially true when the last expression from the District Courts of the temporarily divergent circuit (the Second) recognize the obvious situation. *Petterson Lighterage* v. *Tug J. R. Russell*, 87 F. Supp. 467, 470 (D.C. N.Y. 1949).

Respondents respectfully object to the motion for leave to file a brief *amicus curiae*.

The burden of this litigant in recovering under the plain decisions of this Court against the tug boat industry have already been heavy enough.

Respectfully submitted,

EDWARD B. HAYES,
135 South La Salle Street,
Chicago, Illinois,
Proctor for Appellee.